United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPLICATION NO P-08–328 OF 1996
LAMIN PCA, ABU MANSOR AND MOKHTAR SIDIN JJCA
13 MARCH 1999

Civil Procedure *— Appeal — Leave to appeal — Applicant found to be liable to respondent in court below — Whether applicant shown any reason for court to interfere with trial judge's findings — Whether leave to appeal should be granted*

The applicant, United Oriental Assurance Sdn Bhd, was the second defendant in the court below. There, the court had held that the applicant was generally liable to the respondent as insurer per se. The respondent had filed a claim against the appellant and the first defendant for a sum less than RM250,000. Thus, this application for leave to appeal to the Court of Appeal. It was the applicant's contention that leave should be given on grounds that the decision of the trial judge affects a fundamental principle of law, is of vital importance in the public interest, involves a serious and important issue of law, and there is a question of general principle where further argument before a higher tribunal would be of public advantage.

Held, dismissing the application:
The applicant's submission amounted to nothing more than saying that the learned trial judge had found them to be liable (see p 546B). The court found that there had been no error by the court below andthere was therefore no reason to interfere with its finding (see p 546D–E).

[Bahasa Malaysia summary

Pemohon, United Oriental Assurance Sdn Bhd, merupakan defendan kedua di mahkamah bawahan. Di sana, mahkamah telah memutuskan bahawa pemohon adalah secara amnya bertanggungan kepada responden sebagai penanggung insurans per se. Responden telah memfailkan tuntutan terhadap perayu dan defendan pertama untuk suatu jumlah yang kurang daripada RM250,000. Oleh itu, permohonan ini adalah untuk kebenaran untuk merayu ke Mahkamah Rayuan. Pemohon menegaskan bahawa kebenaran patut diberikan atas alasan-alasan bahawa keputusan hakim perbicaraan telah menjejaskan prinsip undang-undang yang asas, ia adalah sangat penting dalam kepentingan awam, ia melibatkan isu undang-undang yang perlu dan penting, dan terdapat satu persoalan prinsip am di mana hujahan seterusnya di hadapan tribunal yang lebih tinggi akan memberikan kebaikan awam.

Diputuskan, menolak permohonan tersebut:
Hujahan pemohon terjumlah kepada tidak lebih daripada mengatakan bahawa hakim perbicaraan telah mendapati mereka bertanggungan

(lihat ms 546B). Mahkamah berpendapat bahawa tidak terdapat apa-apa kesilapan di mahkamah bawahan dan oleh itu tidak terdapat alasan untuk mengganggu penemuan mahkamah tersebut (lihat ms 546D–E).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 668–709.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Pang Hon Chin v Nahar Singh [1986] 2 MLJ 145 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(a)

Appeal from: Civil Suit No 22(23)–260 of 1988 (High Court, Pulau Pinang)

A Kanesalingam (*Kanesalingam & Co*) for the appellant.
Teoh Soo Bee (*K Ahmad & Yong*) for the respondent.

Abu Mansor JCA (delivering judgment of the court): The applicant, by Notice of Motion, applied for leave to appeal to the Court of Appeal, under s 68(1)(a) of the Courts of Judicature Act 1964, against the whole decision of Abdul Hamid Mohamed J, given on 1 July 1996 in the High Court at Penang in Civil Suit No 22(23)-260-88 and for the usual further order of extension of time to file and serve a notice of appeal and costs.

Mr Ng Hong Ching, the applicant's Manager, Accounts Department, affirmed an affidavit in support of the application. He stated that on 1 July 1996, Abdul Hamid Mohamed J made an order that the applicant would be liable as an insurer per se in respect of a claim by the respondent against one other party and the applicant in the said High Court.

The applicant is not satisfied with the whole of the said decision and since the claim of the respondent is for a sum less than RM250,000, ie RM120,288.40, leave to appeal is, therefore required.

After hearing, the parties on 2 March 1999, we dismissed the applicant's motion with costs to the respondent. We now give our reasons for such dismissal.

In order that we may appreciate better the dispute leading up to this application before us, it is necessary that we give the facts of this present claim.

The plaintiff (respondent here) is Penang Medical Centre Sdn Bhd whose address at No 1, Jalan Pangkor, Pulau Pinang. The first defendant, Kenchan Associates Sdn Bhd ('the first defendant') does business at Wisma Central, Kuala Lumpur and the second defendant, United Oriental Assurance Sdn Bhd (applicant here), is also in Kuala Lumpur at No 36, Jalan Ampang.

By an oral agreement made between the first defendant, the plaintiff and the second defendant on or before 1 September 1986, the plaintiff agreed, at the first defendant's request, to participate in a group insurance scheme known as the Medicity Health Insurance Plan ('the insurance plan') pursuant to which the first defendant was to arrange to cover certain individuals, to be registered with the first defendant, as members for group medical insurance cover under the said insurance plan with the second defendant.

It was also orally agreed between the plaintiff, the first defendant and the second defendant that payment of the plaintiff's fees, incurred by the first defendant's members' medical treatment were to be paid by the second defendant upon claims being submitted by the plaintiff to the second defendant whereupon the first defendant would assist with regard to the settlement/payment of such claims by liaising between the plaintiff and the second defendant.

Though the above was the agreement of the parties, in actual practice, however, since the plaintiff's participation, the plaintiff's fees incurred by the first defendant's members had been paid direct to the plaintiff by the first defendant as agents for the second defendant.

In the implementation of this insurance plan, it was pleaded in the plaintiff's claim that the parties did come to some alternative arrangement which resulted in the first defendant holding in favour of the plaintiff sums payable under the insurance plan.

The parties relation did not run as smoothly as expected and by 10 February 1988 the second defendant's representative agreed to look into a long outstanding claim of the plaintiff amounting to RM110,904.25.

By 22 April 1988, the plaintiff was informed by the first defendant that a sum of RM28,649.15 had been approved by the second defendant but the plaintiff, as of that date, had only received RM890.10 towards that RM28,649.15. At a meeting on 22 April 1988, the first defendant requested to be given till the end of May 1988 to sort out all claims but no payment was made eventually.

On 8 June 1988, the first defendant put forward certain proposals to settle the claim, as pleaded in para 11 of the plaintiff's statement of claim, but it was rejected by the plaintiff.

In this claim as pleaded, the first and the second defendants failed to pay the plaintiff the sum of RM120,288.40, being the plaintiff's fees for attending to the patients/members of the first defendant under the insurance plan and that sum was due and owing to the plaintiff as at 29 May 1988.

As no payment was made by the first and the second defendants inspite of repeated demands, the plaintiff, by notice on 30 June 1988, terminated the insurance plan with effect from 1 October 1988, at the same time demanding settlement of the outstanding sum as of that date. The plaintiff's solicitors then issued the required notice demanding that sum.

A The plaintiff, therefore, prayed for a sum of RM120,288.40 being the amount of claim up to 29 May 1988, the usual interest from 30 May 1988 up to realization and other sums incidental of legal and other costs.

The first defendant was not represented by anyone. The second defendant in the statement of defence, while admitting that they did issue a B policy of insurance to the first defendant, known as Medicity Health Insurance Plan, denied that they had entered into any agreement with the plaintiff at all and consequently denied any privity of contract between them and the plaintiff. The other portions of the second defendant's statement of defence all go towards denial of the alleged arrangement with the plaintiff. The second defendant admitted to sending the officials to the meetings C spoken of by the plaintiff, but defended themselves that the meetings were on 'without prejudice' basis. The second defendant also admitted processing 122 claims from the first defendant but said they had credited to the first defendant the sum owing. In the alternative, the second defendant averred the plaintiff had made excessive claims and not in accordance with the policy issued by the second defendant.

D The plaintiff's claim came before Abdul Hamid Mohamed J on 8 April 1996. Instead of proceeding with the whole claim, by consent, the parties agreed that that day's hearing was only for the purpose of determining the question whether the second defendant insurer is generally liable as insurer per se to the plaintiff in respect of the claims made herein before going into E each claim one by one — as ordered on 29 February 1996. In a full hearing, where the plaintiff called three witnesses and the second defendant called one witness, over a two day period and after having had the benefit of arguments of counsel for the plaintiff and the second defendant and their written submissions, the learned judge adjourned the case for judgment on 1 July 1996 and he answered the question posed by the parties in the F affirmative. The learned judge ordered the second defendant to pay the plaintiff the amount to be determined in the application and he also ordered costs against the second defendant.

As already stated, the applicant was seeking the leave of this court to appeal against the decision of the learned judge. Section 68 of the Courts of G Judicature Act 1964 provides:

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) When the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit except with the leave of the Court of Appeal.

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In the same affidavit of Mr Ng Hong Ching, affirmed in support of this motion for leave, in para 7 thereof he is advised and verily believe that leave to bring an appeal should be given to the applicant on the following grounds:

I (i) It is a decision affecting a fundamental principle of law;

(ii) It is a decision of vital importance in the public interest;

(iii) There is a serious and important issue of law involved;

(iv) There is a question of general principle upon which further argument and a decision of a higher tribunal will be a public advantage.

Before us Mr Kanesalingam for the second defendant, with due respect, failed to show us that the learned judge's decision was anything of those as alleged in para 7 of the supporting affidavit. Counsel's submission was nothing more than saying that the learned judge had found that the insurance company, the second defendant, are liable.

He also referred us to the evidence of PW3, Chan Foo Yau. He submitted that at p 60E of the motion, the notes of the proceedings before the learned judge showed that the whole sum had been settled.

As a matter of fact, PW3's (PW4 an error) evidence commenced at p 49 of the record. The witness PW3 was the Managing Director of the first defendant. The witness, as expected, was able to describe to the learned judge what the group insurance plan was all about. PW3's evidence is found from pp 49–62 and the whole of the evidence had provided the foundation for the learned judge to enable him to answer the question posed by the parties in this action that the second defendant was liable to pay the plaintiff for amounts to be determined by him at a later date.

It is trite law and very well settled that an appellate court will not lightly interfere with the finding of the court below unless it can be shown the lower court had erred. In an application to the Court of Appeal where leave is sought, the matter is still dealt with by the principles enunciated in *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145 where Edgar Joseph Jr J (as he then was) held that leave can only be given 'where the applicant is able to demonstrate a prima facie case of error'. We find no such error.

For reasons given as stated above, we dismiss this application for leave to appeal with cost. The applicant are at liberty to proceed further, if they so wish but before the applicant set out to do so, they may well want to consider their position in view of the decision of the Federal Court in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 where that court, for reasons given, declined to give leave to appeal to it from the refusal of leave to appeal by the Court of Appeal.

Application for leave to appeal dismissed with costs.

Reported by Joel Ng